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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRUSTMARK INSURANCE COMPANY,

Petitioner,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Arbitration is a matter purely of agreement: only if a party has contracted to arbitrate a dispute may it be compelled to arbitrate, and unless the parties clearly indicate otherwise, the arbitrability of a dispute is for judicial determination. The present case involves alleged breach of a Confidentiality Agreement. Even though this Agreement has no arbitration clause, the Seventh Circuit held that the Petitioner must arbitrate the arbitrability and merits of the breach-of-contract claim, on the ground that a *different* contract, entered years earlier between non-identical parties, had an arbitration clause. The court did so even though the alleged breach was *by one of the arbitrators* — the court held that post-arbitration review would prevent any irreparable harm. This decision conflicts with decisions of this Court and other circuits, creating confusion and uncertainty regarding important arbitration and injunction principles. The questions presented are:

1. May a party may be compelled to arbitrate a breach-of-contract claim when the contract contains no arbitration agreement (and indeed, when arbitration would make an arbitrator a judge of his own claimed breach of contract), because a different agreement between non-identical parties contains an arbitration clause?

2. Is it proper to overturn a preliminary injunction (restraining an arbitrator from sitting in judgment on his own alleged breach of a contract) on the ground that post-arbitration review under the Federal Arbitration Act would prevent irreparable harm?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Trustmark Insurance Company's parent companies are Trustmark Insurance Group, Inc., Trustmark Group, Inc., and the Trustmark Mutual Holding Company. No other company owns 10% or more of the stock of Petitioner Trustmark Insurance Company. As a subsidiary in a mutual holding company, Petitioner Trustmark Insurance Company is ultimately owned by its policyholders.

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ORDERS AND OPINIONS BELOW

The district court for the Northern District of Illinois entered a preliminary injunction on September 30, 2009 (Pet. Appendix A), later reported at 680 F. Supp. 2d 944. Its October 15, 2009 clarification (Pet. Appendix B) is unreported. The Seventh Circuit's January 31, 2011 opinion (Pet. Appendix C) is reported at 631 F.3d 869. The Seventh Circuit denied rehearing on March 1, 2011 (Pet. Appendix D), as reported at 631 F.3d 869.

JURISDICTION

The Seventh Circuit entered its order denying a timely petition for rehearing on March 1, 2011. (Pet. Appendix D.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., provides in part:

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . .

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

. . . .

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the

award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

Arbitration is a creature of contract: parties may be compelled to arbitrate disputes only if they agreed to do so, and arbitrability questions (whether the parties agreed to arbitrate) are ordinarily for courts, not arbitrators, to decide. This case involves two fundamental and important issues: (1) whether a party may be compelled to arbitrate a breach-of-contract claim when the contract contains no arbitration agreement (especially when arbitration would make an arbitrator a judge of his own claimed breach of

contract), simply because another agreement between non-identical parties contains an arbitration clause; and (2) whether irreparable harm is lacking in such a case, on the ground that post-arbitration review under the Federal Arbitration Act ("FAA") is a sufficient remedy for any error.

In 1997 petitioner Trustmark Insurance Co. ("Trustmark") and respondent John Hancock Life Insurance Co. ("Hancock") entered a reinsurance agreement (or "treaty"), with an arbitration clause. They subsequently arbitrated certain disputes under the treaty (the "first arbitration"). In 2003, five parties — Trustmark, Hancock, and the three arbitrators — entered a Confidentiality Agreement, in which the arbitrators agreed to keep their deliberations confidential forever, and all five parties agreed to keep confidential all non-public matters concerning the first arbitration. The Confidentiality Agreement has no arbitration clause.

Trustmark largely won the first arbitration, and both parties moved to confirm the award with the district court. Afterwards, Hancock demanded a second arbitration regarding additional reinsurance disputes, and during discovery for the second arbitration Trustmark learned that Hancock had committed fraud in the first arbitration and federal confirmation proceedings, by withholding critical evidence and presenting false evidence. Compounding the fraud, Hancock breached the Confidentiality Agreement, and induced its party-arbitrator (a party to the Confidentiality Agreement) to breach the Agreement. Trustmark filed a federal complaint against Hancock, for fraud and breach of the Confidentiality Agreement (seeking relief from the prior

judgment, an injunction, and other relief). Based on Trustmark's showings, the district court preliminarily enjoined Hancock from using the same party-arbitrator in the second arbitration.

The Seventh Circuit reversed the preliminary injunction, holding that Trustmark must arbitrate, before a panel including the very arbitrator accused of breaching the confidentiality contract, whether the breach-of-contract claim is arbitrable and whether the contract was breached, subject only to post-arbitration review pursuant to the FAA. It held that any claim of irreparable injury was "frivolous," and that post-arbitration FAA review was enough to correct any error, even as it also emphasized the extremely limited review afforded under the FAA (since "the powers of an arbitrator [include] the power to err" and "an award need not be correct to be enforceable").

The Seventh Circuit's rulings—(1) that the confidentiality issue is properly decided, even if erroneously, by the breaching arbitrator in the first instance, and (2) that being compelled to arbitrate this issue is not an irreparable injury — conflict with decisions of this Court and other circuits, on issues of national importance concerning arbitration and injunctive practice. Certiorari is warranted.

A. Factual Background

In 1997, Hancock and Trustmark, each acting through agents — Hancock through underwriter Reginald Billyard and his company JEH Re Bermuda — agreed that Trustmark would provide Hancock certain excess-

of-loss reinsurance.[1] Their reinsurance treaty provided for arbitration of disputes before a three-member panel of arbitrators.

Under a reinsurance treaty, the ceding insurer receives claims from its insureds, and bills the reinsurer, which may audit or dispute the billings. In 2002 Hancock billed Trustmark for certain losses that Trustmark disputed. Arbitration ensued, with each party appointing a party arbitrator, and a neutral (or "umpire") being selected by lot. In 2003, before the arbitration began, the parties and the three panel members entered into a Confidentiality Agreement, providing that each "Arbitrator . . . evidences by his execution hereof his undertaking to maintain Arbitration Information [defined as including the arbitration panel's deliberations and discussions] in confidence" forever (with exceptions not relevant here). There are important reasons for the custom in the reinsurance industry of keeping individual arbitrations confidential. Because a reinsurer's asserted obligations under a reinsurance treaty may arise bit by bit over a long time period, and each episode, if disputed, is resolved by the process of arbitration — an informal process in which decisions (i) typically state no reasons, (ii) may be the product of compromise, and (iii) are relatively unreviewable — each arbitration is treated as resolving only the specific losses presented.

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1. An insurer that directly insures policyholders may be reinsured by another insurer, and a reinsurer may be further reinsured, to spread risk. Thus, a direct insurer may "cede" all or part of a risk to a reinsurer ("cession"), which may in turn cede risk to another reinsurer ("retrocession"). *See, e.g., Colonial Am. Life Ins. Co. v. Comm'r*, 491 U.S. 244, 246-47 (1989); *Second Russian Ins. Co. v. Miller*, 268 U.S. 552, 554 (1925).

Trustmark largely won the arbitration: Hancock sought nearly $4 million, but the arbitration panel disallowed most of the items. One small disputed amount involved losses for which Hancock was a reinsurer of reinsurers ("retrocession business"). Hancock contended that the treaty covered these disputed losses, while Trustmark contended the treaty covered only Hancock's reinsurance of direct writers. The arbitrators concluded that "[w]ith regard to the coverage of *the specific cessions in dispute in this arbitration*, the Panel finds . . . that retrocession business is covered and properly ceded to *the contracts in dispute*." (Emphases added.) The panel's final award was in favor of Trustmark, in the net amount of $366,330.

Both parties asked the district court to confirm the final award under the FAA, 9 U.S.C. § 9. Hancock further requested a judgment declaring that the treaty covered retrocession generally, but the district judge (noting, inter alia, the Confidentiality Agreement) refused, entering a simple judgment for the amount of the award, which Hancock did not appeal. *Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 2004 WL 1376409 (N.D. Ill. June 17, 2004).

In August 2004, Hancock billed Trustmark for substantial new claims (eventually amounting to $12 million plus $24 million in reserves). Trustmark asked to audit, and Hancock demanded arbitration. Hancock chose as its party arbitrator the same arbitrator as in the first arbitration (Mark Gurevitz), and Trustmark reluctantly agreed only after receiving assurance that he would observe the Confidentiality Agreement, and would not share the deliberative process of the first arbitration panel with the second panel.

Hancock's new billings included substantial retrocession claims. The parties disagreed whether the prior arbitration award "precluded" (i.e., conclusively decided) this issue. Trustmark's position was that the award, by its express terms, governed only "the specific cessions in dispute in th[e first] arbitration" — and that one could conclude nothing more, for the award stated no reasons (in the parlance, it was an "unreasoned award"); arbitration decisions can be based on compromise rather than principle; and the prior panel's deliberative process was confidential.

Hancock took the position that the final award "precluded" any question whether the treaty included retrocession (despite the final award's expressly limited terms and the district judge's rejection in the confirmation proceedings of Hancock's request for a special finding that the treaty included retrocession). In the second arbitration, Hancock also asked the panel to set aside the Confidentiality Agreement — i.e., to abrogate a contract over which the panel (two of whose members were total strangers to the contract) had no authority.

In January 2007, a 2-1 majority of the panel (over Trustmark's objection and over a dissent by Trustmark's appointee) declared that it "extended" the Confidentiality Agreement to include its members as new parties, something it simply had no power to do under contract principles and the Agreement's terms. Then, in April 2007, the panel majority (again including Gurevitz) ruled that the prior arbitration "precluded" the retrocession issue.

Hancock had a powerful motive to preclude inquiry into whether the treaty included retrocession. Its agents, JEH and Billyard, had bound Hancock to reinsure a disastrous book of reinsurance business, causing Hancock

huge monetary losses, which it wanted to shift to the much smaller Trustmark. But, as Trustmark learned, Hancock knew all along that the treaty did not include retrocession.

In June 2009, during pre-hearing discovery, Hancock accidentally produced a "smoking gun" document that it had suppressed during the first arbitration, plus other damaging documents. These documents demonstrated that Hancock's own underwriter, Billyard, knew that retrocession was not included in the treaty, and had so advised a Hancock executive in July 1998. Billyard's deposition confirmed these facts. This revelation proved that Hancock's evidence and arguments about retrocession in the first arbitration were lies.

B. Proceedings Below

1. Trustmark's Complaint for Fraud and Breach of Contract

In July 2009, Trustmark filed the present federal complaint (which was assigned to the same district judge who had confirmed the prior arbitration award). It alleged that Hancock committed fraud during the prior arbitration and court confirmation proceedings — a fraud neither discovered nor discoverable until Hancock's June 2009 production — and sought damages, relief from the prior judgment, an unjust-enrichment remedy, and an injunction.[2] Trustmark's amended complaint added a claim

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2. The Seventh Circuit said the request for relief from the judgment was "obviously untimely" under Fed. R. Civ. P. 60(b). Pet. App. 22a. But Trustmark had invoked Rule 60(d) (conferring power to "set aside a judgment for fraud on the court" at any time). The Seventh Circuit also mistook other facts, but it is its treatment of legal issues that merits certiorari.

that Hancock breached the Confidentiality Agreement and induced a breach by Gurevitz. The Confidentiality Agreement is a contract, and has no arbitration clause, making it appropriate for Trustmark to ask the court to adjudicate this breach-of-contract claim.

2. The Preliminary Injunction

Because the arbitration hearing was approaching, Trustmark moved for a preliminary injunction based on Gurevitz's breach of the Confidentiality Agreement (including his disclosure of the first arbitration panel's deliberative process to the second panel). Trustmark argued that it would be irreparably injured if the second arbitration went forward with Gurevitz as an arbitrator, because breach of the Confidentiality Agreement (a matter of contractual right, independent of the right to be free from arbitrator bias) would not be reviewable after the arbitration took place, in FAA review proceedings. On Trustmark's motion, the district judge preliminarily enjoined Hancock from having Gurevitz serve as an arbitrator in the second arbitration.

The district court explained in detail its reasons for entering a preliminary injunction. Pet. Appendix A. After Hancock moved to reconsider, the district court further clarified its reasoning. Pet. Appendix B. The court noted that the federal lawsuit was an independent breach-of-contract action, subject to no arbitration agreement:

> The dispute here arises out of the Confidentiality Agreement, not the Reinsurance Agreement. The Confidentiality Agreement, which obviously came after the Reinsurance Agreement, contains no arbitration clause, nor does it incorporate

> or reference the Reinsurance Agreement in any way. Also, the Confidentiality Agreement involves additional parties – the Arbitrators "who evidence[d] by [their] execution hereof of [their] undertaking to maintain Arbitration Information in confidence[.]" The Confidentiality Agreement is a separate contract, binding on more than just the Plaintiff and Defendant, and Hancock points to no authority that supports the idea that such an agreement is encompassed by an arbitration clause in an earlier separate agreement.

Pet. App. 17a. The district court enjoined Gurewitz's service as an arbitrator in the second arbitration because he had already "breached the Confidentiality Agreement to which he was a party," and as an arbitrator he would sit in judgment of his own conduct while participating in the second arbitration. Pet. App. 8a-10a. He would be conflicted, and it would place Trustmark in the position of arbitrating breach-of-contract issues it never agreed to arbitrate, an irreparable harm. Pet. App. 9a-10a.

3. The Seventh Circuit's Reversal

Rather than naming a new arbitrator and proceeding with the second arbitration,[3] Hancock appealed the preliminary injunction. The Seventh Circuit reversed. Among other things, it held the following.

First, the Seventh Circuit held that — even though the Confidentiality Agreement is a contract with no

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3. *Cf. WellPoint, Inc. v. John Hancock Life Ins. Co.*, 576 F.3d 643, 646-49 (7th Cir. 2009) (recognizing legitimacy of replacing party-arbitrator shortly before arbitration).

arbitration clause — the issues under the Confidentiality Agreement (including their arbitrability, and whether one of the arbitrators breached the contract) are for the second arbitration panel to decide in the first instance, subject only to later FAA review. Pet. App. 24a, 27a-29a. The court reasoned that the Confidentiality Agreement was "closely related to" the first arbitration and "presumptively" covered by the reinsurance treaty's arbitration clauses (Pet. App. 28a), but left the ultimate question of arbitrability for the arbitrators to decide, with no practical review, since FAA review is so limited:

> Once the arbitration ends, a party that believes the proceeding flawed because the arbitrators exceeded their remit has a simple remedy: a proceeding under the Federal Arbitration Act to deny enforcement to the award. See 9 U.S.C. §10(a)(4) (award may be set aside "where the arbitrators exceeded their powers"). If the award should be set aside, litigation in the proper forum would ensue.
>
> . . . .
>
> If in [resolving "ancillary questions" about the Confidentiality Agreement] the arbitrators exceed their powers, the court may vacate the award at the end of the proceeding. 9 U.S.C. §10(a)(4). But among the powers of an arbitrator is the power to interpret the written word, and *this implies the power to err*; an award need not be correct to be enforceable.

Pet. App. 24a, 29a (emphasis added).

Second, the Seventh Circuit branded the district court's finding of irreparable harm "frivolous." Pet. App. 25a. It held that entrusting the breach-of-contract issues to the arbitrators (including the issue of an arbitrator's own breach) posed no irreparable harm, since Trustmark's "simple remedy" for any error is post-arbitration review under § 10 of the FAA. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

A. The Seventh Circuit's Decision Conflicts with This Court's Arbitration Decisions and Creates Confusion About Important Arbitration Principles.

This Court has repeatedly held that parties cannot be compelled to arbitrate disputes (including disputes about arbitrability) unless they clearly agreed to do so:

> The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability*," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise."

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (emphasis in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986), and *First Options v. Kaplan*, 514 U.S. 938, 944 (1995)). *See also Granite Rock Co. v. Int'l B'hd of Teamsters*, 130 S. Ct. 2847, 2859 (2010) (the federal policy favoring arbitration does not "override[ ] the principle that a court may submit to arbitration 'only those disputes . . . that the parties have agreed to submit'") (citations omitted); *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74

(2010) (arbitration "is a matter of consent, not coercion," and courts must "give effect to the contractual rights and expectations of the parties") (citations omitted). The "parties' intentions control" because arbitration involves surrender of important rights:

> [A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution . . . , "agreeing to . . . trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

The Seventh Circuit's decision throws this settled law into confusion, substituting a presumption of arbitrability for the requirement of intent, making arbitrability an arbitral rather than judicial decision, and requiring an arbitrator to judge his own alleged breach of a contract with no arbitration clause:

• The Seventh Circuit held that a contract with no arbitration clause (and therefore no indication of the parties' intent to arbitrate) is nevertheless presumptively arbitrable if a "related" agreement has an arbitration clause and an arbitration happens to be at hand. Pet. App. 27a-28a (the Confidentiality Agreement contained no arbitration clause, but "the parties *did* agree to arbitrate their disputes about reinsurance" in the reinsurance treaty, and breach-of-Confidentiality-Agreement issues are "ancillary questions" to reinsurance disputes, making

them "presumptively within the scope of the reinsurance contracts' comprehensive arbitration clauses") (emphasis in original).

• The Seventh Circuit held that this arbitrability question is for the arbitrators (not the court) to decide in the first instance, subject only to later FAA review — effectively requiring parties to exhaust arbitration proceedings before seeking an uncertain judicial remedy. Pet. App. 22a, 24a (while acknowledging the Confidentiality Agreement's lack of an arbitration clause and Trustmark's position that only a court, and not an arbitration panel, may decide arbitrability, the court required the arbitrators to decide in the first instance, leaving Trustmark to argue only after "the arbitration ends," in FAA review proceedings, that "the arbitrators exceeded their remit;" and only "[i]f the award should be set aside" — unlikely, as the Seventh Circuit emphasized at Pet. App. 29a — would "litigation in the proper forum . . . ensue").

• And the Seventh Circuit required the parties to arbitrate the breach-of-Confidentiality-Agreement issues before the very arbitrator who is accused of having committed the breach. Pet. App. 25a (expressing more concern for the arbitrator's "reputation" than for the parties' intent and rights; and stating that "Gurevitz does not have any stake in the outcome of this arbitration," even though he plainly does have an interest in the claim that he himself breached the confidentiality contract).

Even if arbitration would be "a speedy and (relatively) low-cost alternative to litigation" (Pet. App. 28a), that is no reason to require it:

> After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms."

First Options, 514 U.S. at 947 (citations omitted).

The Seventh Circuit's decision throws into confusion formerly settled arbitration principles on which parties need to be able to rely. Certiorari is warranted to restore and clarify important arbitration principles.

B. The Seventh Circuit's Decision Creates Conflict Among the Circuits on Important Issues Regarding Irreparable Harm and Injunction Standards.

The Seventh Circuit held that the preliminary injunction was improper because Trustmark's claim of irreparable injury was "frivolous." Pet. App. 25a. It held that being compelled to arbitrate a non-arbitrable claim does not cause an irreparable injury, but only a delay:

> [T]he proposition that going forward with an arbitration "unalterably deprives the party of its right to select the forum" . . . is false. Once the arbitration ends, a party that believes the proceeding flawed because the arbitrators exceeded their remit has a simple remedy: a proceeding under the Federal Arbitration Act to deny enforcement to the award.

Pet. App. 24a.

This rosy view of post-arbitration FAA review is unrealistic and baselessly trivializes a party's right to refuse an arbitral forum. This Court has recognized that who decides an issue — court or arbitrator — "can make a critical difference,"

> because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute . . . . But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.

First Options, 514 U.S. at 942. *Accord, AT&T*, 475 U.S. at 648. Lack of judicial process, including lack of practical review, constitutes irreparable harm. If a member of the second arbitration panel breaches the Confidentiality Agreement by channeling the deliberations of the prior panel in deciding the meaning of the treaty, the black box of the resulting "unreasoned" award will never even present that breach for review under the FAA.

The Seventh Circuit's holding warrants certiorari because it creates a stark circuit split on the standards for irreparable injury and the availability of injunctive relief. Other courts have recognized that "[b]eing forced to arbitrate a claim one did not agree to arbitrate constitutes an irreparable harm for which there is no adequate remedy at law." *UBS Securities, LLC v. Voegeli*, 2011 WL 13465, at *1 (2d Cir. Jan. 4, 2011) (*per curiam*, Jacobs, Calabresi, Sack, JJ.) (citing *Merrill Lynch Inv. Managers*

v. Optibase, Ltd., 337 F.3d 125, 129 (2d Cir. 2003) (*per curiam*, Kearse, Jacobs, Cabranes, JJ.)). *See also Maryland Cas. Co. v. Realty Advisory Bd. on Labor Rel'ns*, 107 F.3d 979, 985 (2d Cir. 1997) (party "would be irreparably harmed by being forced to . . . arbitrate[e] an issue that is not arbitrable"); *McLaughlin Gormley King Co. v. Terminix Int'l Co.*, 105 F.3d 1192, 1194 (8th Cir. 1997) (preliminarily enjoining arbitration pending judicial determination of arbitrability); *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 514-15 (3d Cir. 1990) (Becker, J.) ("we think it obvious that the harm to a party would be *per se* irreparable" if it were compelled to arbitrate a non-arbitrable issue), *overruled on other grounds by Howsam*, 537 U.S. 79 (2002); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 354 n.4 (5th Cir. 2003) (citing *PaineWebber*).

Review by this Court is needed to resolve this circuit split and provide guidance on an important issue of injunctive procedure.

CONCLUSION

Trustmark respectfully asks the Court to grant this petition to resolve important questions regarding arbitration and injunction standards.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, DATED SEPTEMBER 30, 2009*

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

TRUSTMARK INSURANCE COMPANY,
an Illinois corporation,

Plaintiff,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY,
a Massachusetts corporation,

Defendant.

UNDER SEAL

No. 09 C 3959

Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

At issue in this case is whether Defendant John Hancock Life Insurance Company ("Hancock"), through

*The district court's orders were originally filed under seal, but the district court unsealed them by order dated May 28, 2010.

certain 1997 reinsurance contracts with Plaintiff Trustmark Insurance Company ("Trustmark"), ceded to Trustmark "retrocessional business" in addition to the "direct business" that both parties agree was part of the deal.[1] These reinsurance contracts each contain a mandatory arbitration clause for disputes relating to the interpretation or performance of the agreements, including their "formation or validity, or any transaction" arising under the agreements. The contract specifies that "[a]ll arbitrators and their companies must be disinterested in the outcome of the arbitration." Hancock initiated arbitration (the "First Arbitration") in 2002, after Trustmark refused to honor billings associated with Hancock's retrocessional business. Hancock's party-appointed arbitrator was Mark S. Gurevitz. As part of this arbitration, the parties entered into a Confidentiality Agreement, under which the documents exchanged, testimony given, and the ultimate award were subject to confidentiality. Each arbitrator also signed the Agreement, which did not contain an arbitration clause. In March 2004, after a two-week hearing, the arbitration panel found that retrocessional business was "covered and properly ceded to the contracts in dispute." On June 17, 2004 I issued an order confirming the award and its confidentiality, pursuant to the Confidentiality Agreement.

Following the First Arbitration, Hancock sent Trustmark a new billing which was once again disputed

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1. "Direct business" is Hancock's reinsurance for companies offering direct insurance to the public. "Retrocessional business" is reinsurance that Hancock provides to other reinsurers.

by Trustmark. Hancock, again, initiated arbitration (the "Second Arbitration"), and appointed Gurevitz, who also served on the panel of the First Arbitration. In December 2005, the parties conducted an organizational meeting, at which Trustmark representatives expressed some concern with regard to Gurevitz's ability to honor the Confidentiality Agreement he had signed. Gurevitz expressed that although he "would scrupulously abide by confidentiality," he might find it "hard to segregate, difficult to deal with" particular knowledge he had from the First Arbitration that other panelists in the Second Arbitration did not have. After questioning by Trustmark representatives, Trustmark agreed to the appointment.

During the Second Arbitration, Hancock, over Trustmark's objection, requested that the panel "expressly authorize the use of all materials from [the First Arbitration], without limitation[,]" so that the parties could avoid relitigating issues decided in the First Arbitration – namely, whether retrocessional business was covered by the contracts. Hancock's arbitrator, Gurevitz, despite being a signatory to the Confidentiality Agreement, did not recuse himself from the deliberations as to whether the second panel could grant such a request. Gurevitz, joined by the Umpire, Frank Haftl, issued Interim Award #10, in which the Panel "accept[ed] and extend[ed] the confidentiality of the [F]irst [A]rbitration to the two members of the current arbitration (Mr. Haftl and Mr. [Jack] Koepke [Trustmark's appointed arbitrator]) who were not parties to the previous arbitration." Approximately one month later, Hancock requested that the second panel issue an order prohibiting Trustmark

from litigating nineteen matters that it argued were resolved by the first panel. After receiving briefing on the issue, the panel, in a 2-to-1 decision, with Gurevitz and Haftl in the majority, ruled that Trustmark was precluded from relitigating numerous issues, including the claim that retrocessional business was not covered by the reinsurance contracts.

Trustmark argues that in the First Arbitration, Hancock fraudulently concealed certain evidence material to the question of whether retrocessional business was properly ceded under the contracts, thereby procuring the First Arbitration's result by fraud. According to Trustmark, the preclusion order by the second panel is therefore tainted and the Second Arbitration should be enjoined to stop Hancock from furthering its fraudulent scheme. Trustmark now moves to enjoin further breaches of the Confidentiality Agreement (the initial breaches of which resulted in the preclusion order), obstruction of access to documents relating to the terms of the reinsurance agreement, and participation in the Second Arbitration with any of the panel members currently on the second panel. Since the Motion for Preliminary Injunction was filed, Hancock has agreed to abandon its preclusion claim, allowing the parties to relitigate, in light of allegedly concealed (and newly revealed) evidence, the question of whether the retrocessional business was properly ceded to Trustmark. Hancock has also agreed to participate in further discovery, again in light of the newly revealed documents. For these reasons, Trustmark's first two requests for relief are moot and I need not address

their supporting arguments, including the allegations of fraud.[2]

As to enjoining the scheduled Second Arbitration, Trustmark bases its motion on two grounds. First, Trustmark maintains an injunction is necessary to prevent the second panel from resolving disputes between the parties over the Confidentiality Agreement, which, Trustmark asserts, is not subject to arbitration. Second, Trustmark argues that Gurevitz breached the Confidentiality Agreement when he participated in deliberations on the issue of whether it should be extended, also necessitating injunction in order to put an end to Gurevitz's arbitral services, as he is no longer "disinterested."

For the following reasons, Trustmark's motion is granted in that I am enjoining the parties' participation in the Second Arbitration with Gurevitz on the panel. However, I decline to find that umpire Haftl and Trustmark's party-appointed arbitrator Jack Koepke need be removed from the Panel.

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2. Because Hancock has agreed to set aside the preclusion order and relitigate the issue of whether its retrocessional business was properly ceded, I see no need to address these arguments. Trustmark raises them (1) because the breach of the Confidentiality Agreement was a necessary condition to the issuance of the preclusion order; and (2) because a result procured by fraud in the First Arbitration would taint the Second Arbitration, specifically with respect to the preclusion order. However with the preclusion order out of the picture, and the fruits of the poisoned tree removed, the issue is moot.

II. STANDARD OF REVIEW

In seeking a preliminary injunction, Trustmark must demonstrate (1) a likelihood of success on the merits; and (2) the absence of a remedy at law or irreparable harm if injunction is denied. *See Plummer v. American Inst. Of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996); *and Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). If these conditions are met, the court must next "consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied[,]" as well as the public interest in granting or denying the injunction. *Ty, Inc.*, 237 F.3d at 895 (citing *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994)). The court must then weigh all the factors employing a "sliding scale" approach – "the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need favor the plaintiff's position." *Id.*

III. DISCUSSION

Trustmark seeks to enjoin the Second Arbitration on the ground that the Confidentiality Agreement is non-arbitrable. Trustmark seeks to disqualify Gurevitz on the grounds that: (1) he is not a "disinterested" party, as required under the reinsurance contracts; and (2) he has disclosed confidential information from the First Arbitration to the second panel.

Hancock maintains that this challenge is premature under *Smith v. Am. Arbitration Ass'n, Inc.*, 233 F.3d 502, 506 (7th Cir. 2000), which stated that the time to challenge an arbitration on any grounds is post-award. However, the Seventh Circuit in *Duthie v. Matria Healthcare, Inc.*, 540 F.3d 533 (7th Cir. 2008), affirmed a pre-award injunction where the arbitration clause did not provide for the arbitration of a specific dispute at issue. Trustmark cites *Duthie*, arguing that its challenge to Hancock is not premature, and that parties may bring pre-award challenges based on contract claims, in other words, those not grounded in the FAA. Trustmark maintains that it is not challenging Gurevitz's partiality or bias, but rather the Panel's infection by Gurevitz's breach of the Confidentiality Agreement. Trustmark's Underwriting Agreement with Hancock requires the arbitration of disputes by arbitrators who are "disinterested in the outcome of the arbitration." Trustmark maintains that Gurevitz can in no way be "disinterested" in construing the Confidentiality Agreement to which he is a party.

Trustmark argues that Gurevitz is not "disinterested" for two reasons: (1) he construed the terms of the Confidentiality Agreement to which he is a party, and (2) he served as Hancock's party-appointed arbitrator in the first arbitration.

Trustmark relies on *International Insurance Co. v. Certain Underwriters at Lloyd's of London*, 1992 U.S. DIST. LEXIS 22851 (Sept. 8, 1992) for the proposition that Gurevitz can be found to be "disinterested" on the second ground. In that case, the court disqualified an arbitrator

on two grounds, one of which was his participation in other arbitrations involving one of the same parties. The court found it likely that the arbitrator would hear evidence in one arbitration that might bear on issues raised in the other, noting that such evidence would be *ex parte*. *Id.* at *6-7. The court then cites as authority cases which address the issue of *ex parte* acts by arbitrators as misconduct. That is not the situation here. Trustmark is not alleging *ex parte* acts by Gurevitz, nor could it, since it was a party to the first arbitration.

Notwithstanding my disagreement with this reasoning, I find that Gurevitz is not a disinterested arbitrator. To begin, he breached the Confidentiality Agreement to which he was a party.[3] By his failure to abide by the Agreement, he has breached his duty to Trustmark, who in this case, was the beneficiary of the Agreement,[4] and Trustmark may seek to hold Gurevitz liable for his breach depending on the circumstances that arise as the Second Arbitration proceeds. It is true that party-appointed arbitrators are not held to the same neutrality standards as umpires. *See e.g., Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 552 (8th Cir. 2007) ("The requirement that neutral arbitrators make disclosures does not extend

3. I should also note that by virtue of this breach, Gurevitz violated this court's order confirming confidentiality of the First Arbitration award.

4. Had confidentiality of the First Arbitration award been maintained, there would have been no preclusion order and Trustmark would have had the benefit of relitigating the retrocessional business issue notwithstanding the first panel's finding against Trustmark on the matter.

to party-appointed arbitrators."). However, Gurevitz's position now renders him interested in the outcome of the arbitration, in violation of the parties' Underwriting Agreement.

Furthermore, by breaching the Agreement, Gurevitz has now become a fact witness not subject to examination. We typically operate under the presumption that judges and arbitrators can disregard what they already know. This is a strong presumption with regard to arbitrators since, due to the non-binding nature of arbitration, they must routinely determine whether or not to consider an earlier arbitration in the course of a subsequent one. However, here, Gurevitz has already demonstrated that he may well be unable to do this if he continues to serve on the second panel.[5] In Trustmark's vetting of Gurevitz as part of the Second Arbitration, Gurevitz expressed some doubt that he would be able "to segregate" information he had from the First Arbitration, and stated that he would find it "difficult to deal with where the other panel members did not have the same full knowledge." Trustmark points to one instance where, in a conference related to the Second Arbitration, Hancock made a point about a disputed issue in the First Arbitration, and Gurevitz, in support of Hancock, described his recollection of the First Arbitration. In response to Trustmark's objection,

5. Because Haftl and Koepke were not parties to the Confidentiality Agreement and therefore did not breach it, I have no reason to think that they will be unable to set aside their review of the First Arbitration and reconsider the retrocessional business question anew, in light of the new evidence that will be introduced. I see no grounds for their disqualification at this time.

Gurevitz commented with regard to characterizations of certain claims made in the First Arbitration, "I feel it is my duty to correct the record as best as I understand in that regard." The hypothetical posited by Gurevitz during the organizational meeting became realized, and by his actions, he rebutted the presumption that he could disregard knowledge he already had. While party-appointed arbitrators need not be completely impartial, they must be able to adhere to the parties' agreements and the orders of this court. *See Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962) (although party-appointed arbitrators need not be impartial, arbitration award may be vacated by reason of arbitrator misconduct). Trustmark has demonstrated a strong likelihood of success on the merits of its claim to disqualify Gurevitz.

Trustmark argues another contract claim, maintaining that the Confidentiality Agreement is not subject to arbitration. "[W]hether the parties have submitted a particular dispute to arbitration (i.e., the question of arbitrability) is an issue for judicial determination unless they 'clearly and unmistakably' provided otherwise in their agreement." *Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d 909, 915 (N.D. Ill. 2008) (citing and quoting *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 82 (2002)). The Confidentiality Agreement contains no arbitration clause, and according to Trustmark, it is up to this court to decide whether it is arbitrable by the Second Panel. It is true that in the Underwriting Agreement, the parties agreed to submit to arbitration "any dispute or difference between the General Manager and the John

Hancock relating to the interpretation or performance of this agreement, including its formation or validity, or any transaction. . ." However, "[a] dispute that arises under one agreement may be litigated notwithstanding a mandatory arbitration clause in a second agreement, even where the two agreements are closely intertwined." *Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group, Inc.*, 215 F.3d 677, 681 (7th Cir. 2000). It is difficult to see how the Confidentiality Agreement relates to the performance of the Underwriting Agreement or the validity of the cession. Trustmark has relatively strong likelihood of success on the merits of this claim.

Furthermore, Trustmark cannot be forced to arbitrate issues that it did not agree to arbitrate. *See AT & T Technologies v. Communications Workers of America*, 475 U.S. 643, 648, (1986). "Forcing a party to arbitrate a matter that the party never agreed to arbitrate, regardless of the final result through arbitration or judicial review, unalterably deprives the party of its right to select the forum in which it wishes to resolve disputes[,]" causing irreparable harm. *Chicago School Reform Bd. of Trustees v. Diversified Pharmaceutical Services, Inc.*, 40 F. Supp. 2d 987, 996 (N.D. Ill. 1999). This is a harm faced uniquely by Trustmark if it is denied relief and such harm tips the scale in favor of granting injunction. This irreparable harm, coupled with Trustmark's success on the merits, militates in favor of granting an injunction in this case.

The balance of harms favors Trustmark as well. The harm to Hancock, should my decision here be in error, is a delay in an arbitration which it might win resulting in

a loss of interest on funds due to it and this harm is itself not irreparable. The harm to Trustmark of an erroneous decision to deny injunction is an arbitration before a panel which includes a disqualified arbitrator resulting in a flawed and costly process, the result of which might settle nothing. An injunction in this case is consistent with the public interest.

IV. CONCLUSION

For the foregoing reasons, Trustmark's motion for preliminary injunction is granted in that I am enjoining the parties' participation in the Second Arbitration with Gurevitz on the panel.

ENTER:

/s/_____
James B. Zagel
United States District Judge

DATE: September 30, 2009

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, DATED OCTOBER 15, 2009

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge:
Judge Zagel

Sitting Judge if Other than Assigned Judge:

CASE NUMBER: 09 C 3959

DATE: October 15, 2009

CASE TITLE:
TRUSTMARK INSURANCE COMPANY v.
JOHN HANCOCK LIFE INSURANCE COMPANY

DOCKET ENTRY TEXT:

Defendant's Motion for Reconsideration and Clarification (69) is granted. Defendant's request to extend the October 8, 2009 deadline for arguments regarding continuing sealing and redactions is granted. The new deadline is October 19, 2009.

STATEMENT

On September 30, 2009, I enjoined the parties' participation in the Second Arbitration with Gurevitz, a party-appointed arbitrator on the panel. Defendant John

Appendix B

Hancock now moves for clarification and reconsideration on two grounds.[1] Ultimately, Hancock seeks an opinion that the panel of the Second Arbitration "is authorized to determine which issues should be precluded based on the rulings in the first arbitration, apart from the direct/retro issue which the parties have agreed to relitigate."

First, Hancock requests that I clarify my previous order by making it clear "that all prior preclusion rulings apart from Paragraph 1 of Interim Ruling 11 in the Second Arbitration remain in effect and the Second Arbitration Panel retains the authority to amend and supplement these rulings as it deems appropriate." Paragraph 1 reads "Retrocessional Business: The issue of retrocessional business under the treaties at issue, including excess of loss on excess of loss, is precluded."

In my ruling, I included a footnote explaining that Hancock had agreed to "set aside the preclusion order and relitigate the issue of whether its retrocessional business was properly ceded," and later noted that "[h]ad confidentiality of the First Arbitration award been maintained, there would have been no preclusion order and Trustmark would have had the benefit of relitigating the retrocessional business issue notwithstanding the first panel's finding against Trustmark on the matter." These are not rulings, but rather observations I needed to make to explain the situation as it stood on the eve of

1. Although this motion has not been formally presented or responded to, it is appropriate to rule at this time in light of the substance of the motion and the lack of prejudice to the non-moving party.

the Second Arbitration. Hancock had agreed to set aside the preclusion order *with respect to the issue of whether its retrocessional business was properly ceded*, allowing for the relitigation of that one specific issue. I made no rulings as to the preclusion order itself, or whether the Second Arbitration panel has authorization to decide the issues of preclusion now raised by Hancock.

Hancock next points out that the opinion cites to an arbitration clause in the wrong agreement, and they are correct. The cite should have been to the arbitration clause contained in the Excess of Loss Reinsurance Agreement, and not the clause included in the Underwriting Agreement. However, this does not alter the outcome of the opinion. The clause contained in the Excess of Loss Reinsurance Agreement reads:

> Disputes between the parties arising out of this Reinsurance which cannot be resolved by compromise, including but not limited to any controversy as to the validity of this Reinsurance, whether such disputes arise before or after termination of this Reinsurance shall be submitted to arbitration.

Hancock maintains that this clause is broader, and should be interpreted to include the Confidentiality Agreement at issue. In support of this argument, Hancock cites *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Intern., Ltd.*, 1 F.3d 639, 641 (7th Cir. 1993), where the question before the Court was "Does a dispute, which has as its object the nullification of a contract, 'arise out of' that

same contract?" The Court held that it does, noting that "any dispute between contracting parties that is in any way connected with their contract could be said to 'arise out of' their agreement and thus be subject to arbitration under a provision employing this language." *Id.* at 642. The Court cites *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 391 (7th Cir. 1984), where it found that the arbitration clause at issue covered disputes about whether a party to a Reinsurance Agreement induced its counterparty to sign the agreement by verbally agreeing to a condition precedent to pay an advance premium. The counterparty refused arbitration claiming that the contract was void at inception, and therefore there was no obligation to arbitrate. The Court held that "[t]he dispute about the condition precedent involved questions of interpretation and performance[,]" setting it squarely within the parameters of the arbitration clause which governed any differences of opinion with respect to the interpretation of or performance under the agreement at issue.

Hancock also cites *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000), where the party opposing arbitration argued that the contracts at issue were themselves illegal thereby rendering the arbitration clauses therein ineffective. The Court, citing *Sweet Dreams*, held that the parties could not be protected from arbitration by a statute invalidating the agreement, since even this contention "arose out of" and "had its origins in" the agreement. *Id.* at 550-51.

None of these cases addresses the situation before me. Trustmark is not attacking the validity of the Reinsurance

Agreement or the arbitration clause therein. Hancock attempts to argue that the Confidentiality Agreement has its origin in the Reinsurance Agreement, and that in fact, the Confidentiality Agreement would not exist but for the Reinsurance Agreement. But this is too tenuous a connection. The dispute here arises out of the Confidentiality Agreement, not the Reinsurance Agreement. The Confidentiality Agreement, which obviously came after the Reinsurance Agreement, contains no arbitration clause, nor does it incorporate or reference the Reinsurance Agreement in any way. Also, the Confidentiality Agreement involves additional parties – the Arbitrators "who evidence[d] by [their] execution hereof of [their] undertaking to maintain Arbitration Information in confidence[.]" The Confidentiality Agreement is a separate contract, binding on more than just the Plaintiff and Defendant, and Hancock points to no authority that supports the idea that such an agreement is encompassed by an arbitration clause in an earlier separate agreement.

Finally, Hancock maintains that regardless of the arbitrability of disputes under the Confidentiality Agreement, the agreement does not restrict the Second Arbitration panel's authority to consider discovery, evidence and rulings from the First Arbitration. I must once again stress that I made no ruling as to the second panel's authority to determine which issues should be precluded based on the rulings in the first arbitration. But to the extent that Hancock suggests that this should somehow affect my ruling on Trustmark's likelihood of success on the merits, I will address their argument.

Hanc ck cites to case law supporting the proposition that discovery and other procedural questions arising out of an arbitration are for the arbitrators to decide, not a judge.[2] But this is not a discovery dispute – it is a contractual one. Hancock points out that the Confidentiality Agreement itself allows for disclosure of arbitration information "as is necessary in order to comply with subpoenas, discovery requests or orders of any court." However, throughout the Confidentiality Agreement, distinctions are drawn between "court proceedings" and arbitration, and court and arbitrators. This agreement does not expressly allow for disclosure to comply with orders of an arbitration panel.[3]

Hancock also suggests that Trustmark is unlikely to succeed on the merits in the face of "substantial case law stating that issues of preclusion are left to the subsequent arbitration panel." It is true that "arbitrators can take 'arbitral notice' of a previous decision by another arbitrator[.]" *Consolidation Coal Co. v. United*

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2. Notably, Hancock references *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), where although the Court stated that procedural questions are in the province of the arbitrators, it explained that "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court."

3. Even if I were to read the Confidentiality Agreement as allowing for disclosure to comply with orders or subpoenas of an arbitration panel, under Massachusetts law, it is within the courts' power "to vacate any subpoena which it determines is unreasonable, oppressive, irrelevant, or improper." *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 615 (1993).

Mine Workers of America, 213 F.3d 404, 407 (7th Cir. 2000) ("If the parties to the [ ] agreement want the first arbitrator's interpretation of a provision of the agreement or resolution of a dispute arising under the agreement to have preclusive effect, they can so provide; and whether they do so or not, the question of the preclusive force of the first arbitration is, like any other defense, itself an issue for a subsequent arbitrator to decide."). However, this case involves the possible breach of a confidentiality agreement, the existence of which can be interpreted to suggested that at the time, the parties did not intend the First Arbitration to have preclusive force. Furthermore, Hancock points to one case, a controversial judgment of the Lords of the Judicial Committee of the Privy Council in Associated Electric and Gas Insurance Services v. European Reinsurance Company of Zurich, [2003] UKPC 11, in a case on appeal from the Bermuda Court of Appeal. The Judicial Committee found that the parties' confidentiality agreement did not prevent disclosure of the award in a first arbitration to the panel in a second arbitration. While I am not bound by such case law, it is worth noting that the language at issue in that agreement differs from what is before me and I am not persuaded by the reasoning in that case.

None of Hancock's arguments affect my analysis with regard to Trustmark's success on the merits, irreparable harm, and balance of harms. For this reason, I adhere to my previous ruling on the motion for preliminary injunction. I make no finding as to whether the Second Arbitration panel has the authority to determine which issues should be precluded based on the rulings in the First Arbitration.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED JANUARY 31, 2011

In the United States Court of Appeals
For the Seventh Circuit

No. 09-3682

TRUSTMARK INSURANCE CO.,

Plaintiff-Appellee,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.),

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 09 C 3959—**James B. Zagel**, *Judge.*

ARGUED JANUARY 6, 2011—
DECIDED JANUARY 31, 2011

Before EASTERBROOK, *Chief Judge*, and CUDAHY and ROVNER, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* Two insurance companies agreed in 1997 that Trustmark would reinsure some risks underwritten by John Hancock. The details of the parties' multiple contracts are unimportant for our purposes. It is enough to say that the insurers disagree

about the meaning of "London Market Retrocessional Excess of Loss business", which Trustmark need not reinsure. The parties submitted their dispute to arbitration under the contracts' broad arbitration clauses. In March 2004 a tripartite panel (one arbitrator selected by each side, and these two selecting a third, called the umpire) made its award, supporting Hancock's view of Trustmark's obligations. The award was confirmed by a district court. 2004 U.S. Dist. LEXIS 11370 (N.D. Ill. June 17, 2004).

Trustmark was dissatisfied and refused to pay the bills that Hancock sent on the view that the confirmed award governed all of the parties' dealings. This led Hancock to commence a new arbitration in October 2004. Trustmark responded by arguing (among other things) that Hancock had secured the March 2004 award by failing to disclose four documents during arbitral discovery, an omission that Trustmark labeled "fraud." Hancock named as its arbitrator Mark S. Gurevitz, who had participated in the first arbitration as well. Trustmark picked a person who had not participated in the earlier proceeding. The two party-chosen arbitrators selected a neutral umpire. One of the first issues the three-person panel had to tackle was what weight to give the 2004 decision. Hancock contended that it was largely dispositive; Trustmark contended that it should be ignored and the proceedings restarted from scratch. Consideration of this point was complicated by a confidentiality agreement that the parties had reached during the first proceeding. This agreement—which did not include its own arbitration clause—prevented Trustmark and Hancock from disclosing the evidence,

proceedings, and award. The parties debated whether this agreement covered *all* disclosures, even to lawyers and successor arbitrators, or only disclosures to the outside world (such as the firms' business rivals and the press). Gurevitz and the umpire concluded that the arbitrators themselves (and the parties' lawyers) are entitled to know and consider the evidence presented, and the results reached, in the first arbitration.

Before the panel commenced its hearing on the merits, Trustmark launched this suit under the diversity jurisdiction. The suit, filed in 2009, initially asked the court to vacate the decision that had confirmed the 2004 award. That request is so obviously untimely—the time to appeal the district judge's decision had expired five years earlier, and Fed. R. Civ. P. 60(b) does not allow that decision to be reopened—that Trustmark soon reformulated its principal contention, asking the court to enjoin further arbitration as long as Gurevitz remains a member of the new panel. The contracts require all three arbitrators to be "disinterested". Trustmark contended that Gurevitz is not, because he knows what happened in the first arbitration. It also insisted that the new arbitral panel is not entitled to form or act on any view about the meaning of the confidentiality agreement, because that agreement does not include an arbitration clause. Only a judge, Trustmark insisted, can determine what the confidentiality agreement requires.

The district court agreed with Trustmark and issued an injunction. 680 F. Supp. 2d 944 (N.D. Ill. 2010). The judge wrote that Gurevitz is not "disinterested" because he knows what happened during the first arbitration and

could be called as a fact witness about those proceedings. The judge also ruled that the second panel is not entitled to consider the decision made by the first panel. The injunction stopped the arbitration in its tracks. Hancock has appealed.

Equitable relief depends on irreparable injury, and the first question we must address is whether Trustmark showed any. Here is the district court's entire discussion of that subject:

> Trustmark cannot be forced to arbitrate issues that it did not agree to arbitrate. See *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 648 (1986). "Forcing a party to arbitrate a matter that the party never agreed to arbitrate, regardless of the final result through arbitration or judicial review, unalterably deprives the party of its right to select the forum in which it wishes to resolve disputes[,]" causing irreparable harm. *Chicago School Reform Bd. of Trustees v. Diversified Pharmaceutical Services, Inc.*, 40 F. Supp. 2d 987, 996 (N.D. Ill. 1999). This is a harm faced uniquely by Trustmark if it is denied relief and such harm tips the scale in favor of granting injunction. This irreparable harm, coupled with Trustmark's success on the merits, militates in favor of granting an injunction in this case.

680 F. Supp. 2d at 949. There are two principal problems with this understanding.

First, Trustmark *did* agree to arbitrate the question whether the contracts provide reinsurance for certain risks. Yet the district court blocked rather than enforced that contractual undertaking.

Second, the proposition that going forward with an arbitration "unalterably deprives the party of its right to select the forum"—a proposition for which the court did not cite any statute or appellate decision—is false. Once the arbitration ends, a party that believes the proceeding flawed because the arbitrators exceeded their remit has a simple remedy: a proceeding under the Federal Arbitration Act to deny enforcement to the award. See 9 U.S.C. §10(a)(4) (award may be set aside "where the arbitrators exceeded their powers"). If the award should be set aside, litigation in the proper forum would ensue.

The only potential injury from waiting until the arbitrators have made their award is delay and the out-of-pocket costs of paying the arbitrators and legal counsel. Long ago the Supreme Court held that the delay and expense of adjudication are not "irreparable injury"—if they were, every discovery order would cause irreparable injury. See, e.g., *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 222 (1938); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980). We held in *PaineWebber Inc. v. Farnam*, 843 F.2d 1050 (7th Cir. 1988), and *Graphic Communications Union v. Chicago Tribune Co.*, 779 F.2d 13 (7th Cir. 1985), that the sort of argument Trustmark advances in its effort to establish "irreparable injury" is frivolous.

We could stop here, but the district court's decision leaves a cloud over this arbitration and the reputation of arbitrator Gurevitz, a reputation that Trustmark seems determined to tarnish. We therefore add that the district court erred on the merits in addition to mistakenly believing that Trustmark has established irreparable injury.

The contracts require all three arbitrators to be "disinterested." When used with respect to adjudication, this word means lacking a financial or other personal stake in the outcome. See generally *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). Norms of insurance-industry arbitration track this understanding. ARIAS•U.S., *Practical Guide to Reinsurance Arbitration Procedure* §2.3 (rev. ed. 2004) ("disinterest" means no financial stake in the outcome and not being under a party's direct control).

Gurevitz does not have any stake in the outcome of this arbitration. Like any other privately appointed arbitrator, he does have a reputational interest: if his decision disappoints the person who put him on the panel, he is less likely to be selected as an arbitrator in the future. Federal judges, by contrast, serve during good behavior and need not worry about how their decisions may affect their careers. But the interest in potential future employment is endemic to arbitration that permits parties to choose who will decide. See *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, 307 F.3d 617, 622 (7th Cir. 2002) ("evident partiality" for arbitrators means acts that simultaneously show support for one side and

disregard the rules; party-appointed arbitrators can't be dismissed on the ground that they are inclined to support the party who named them). Sometimes parties agree that arbitrators will be named by independent entities, such as the American Arbitration Association, but Trustmark and Hancock reserved the power of appointment. A court cannot properly deem the interest in reemployment created by this arrangement a disqualifying event.

Instead of asking whether Gurevitz had a financial or other personal stake in the outcome, the district judge asked whether he had knowledge about the dispute. Answering yes, the judge deemed the knowledge a form of prohibited "interest." As we observed in *Sphere Drake*, however, private parties often select arbitrators precisely *because* they know something about the controversy. 307 F.3d at 620. Arbitration need not follow the pattern of jury trials, in which a factfinder's ignorance is a prime desideratum. Nothing in the parties' contract requires arbitrators to arrive with empty heads. Federal judges, of all people, should not confuse knowledge with a disqualifying "interest." For judges regularly hear multiple suits arising from the same controversy. The district judge who resolved this very dispute also entered the order enforcing the 2004 award. If knowing about what happened in 2004 is an impermissible "interest," or makes the person a "fact witness" about what had occurred in 2004, then the district judge should have stepped aside from the current suit. Yet that was not required. Knowledge acquired in a judicial capacity does not require disqualification. See *Liteky v. United States*, 510 U.S. 540 (1994). Likewise with knowledge acquired in arbitration.

Appendix C

Arbitrator Gurevitz is as "disinterested" as the district judge himself and just as entitled to participate. That Gurevitz signed the confidentiality agreement does not affect this conclusion; he signed as an adjudicator. The district judge himself implemented the confidentiality agreement, in a similar adjudicatory capacity, when confirming the first panel's award. 2004 U.S. Dist. LEXIS 11370 at *4–5. If there is any difference between the two adjudicators, Gurevitz has the stronger entitlement to participate in this second round, because as we stressed in *Sphere Drake* it takes more to disqualify an arbitrator than to disqualify a judge. 307 F.3d at 621. See also *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983). No party in federal court is entitled to pick his judge, but contracts allowing parties to choose their arbitrators are common; these parties' arrangement instantiates the practice. When one party is entitled to choose its own arbitrator, and in doing so follows all contractual requirements, a court ought not abet the other side's strategy to eject its opponent's choice.

The district judge also erred in concluding that the arbitrators are powerless to construe the confidentiality agreement. True, that agreement lacks its own arbitration clause, but the parties *did* agree to arbitrate their disputes about reinsurance. Arbitrators who have been appointed to resolve a commercial dispute are entitled to resolve ancillary questions that affect their task. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). What's more, the confidentiality agreement—a standard form in insurance arbitration, signed while the arbitration was under way—is closely related to the substance of the first arbitration and presumptively within the scope of the

reinsurance contracts' comprehensive arbitration clauses, which cover all disputes arising out of the original dispute. Cf. *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993).

Suppose that Trustmark and Hancock had agreed to use the procedural rules of the American Arbitration Association, but had not included a separate arbitration clause in that contract. The panel could interpret and apply the AAA's rules; a party dissatisfied by a procedural ruling could not run to a federal district court and get review in mid-arbitration, one ruling at a time, just because neither the AAA's rulebook nor the contract adopting them had a freestanding arbitration clause. So, too, with the terms of the Federal Arbitration Act. Several parts of this statute govern the management of arbitration. For example, §7 says that arbitrators may summon witnesses and require them to bring documents. 9 U.S.C. §7. The Act is a statute; naturally it does not contain an arbitration clause; yet no one supposes (at least, no one *should* suppose) that every time an arbitrator summons (or doesn't summon) a witness, or decides which documents the parties must produce, one or both of the contestants can get immediate review in a federal district court. That would be the end of arbitration as a speedy and (relatively) low-cost alternative to litigation.

Arbitrators are entitled to decide for themselves those procedural questions that arise on the way to a final disposition, including the preclusive effect (if any) of an earlier award. *Consolidation Coal Co. v. United Mine Workers*, 213 F.3d 404, 407 (7th Cir. 2000); *Chicago*

Typographical Union v. Chicago Sun-Times, Inc., 860 F.2d 1420, 1424 (7th Cir. 1988). If in doing so the arbitrators exceed their powers, the court may vacate the award at the end of the proceeding. 9 U.S.C. §10(a)(4). But among the powers of an arbitrator is the power to interpret the written word, and this implies the power to err; an award need not be correct to be enforceable. See, e.g., *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001). It is enough if the arbitrators honestly try to carry out the governing agreements. "[T]he question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract." *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194–95 (7th Cir. 1987). See also, e.g., *Operating Engineers Local 139 v. J.H. Findorff & Son, Inc.*, 393 F.3d 742 (7th Cir. 2004). When this arbitration resumes, the panel is entitled to follow its own view about the meaning of the confidentiality agreement; it need not knuckle under to the district judge's prematurely announced understanding.

REVERSED

1-31-11

APPENDIX D — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED MARCH 1, 2011

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 1, 2011

Before

Frank H. Easterbrook, *Chief Judge*

Richard D. Cudahy, *Circuit Judge*

Ilana Diamond Rovner, *Circuit Judge*

No. 09-3682

TRUSTMARK INSURANCE CO.,

Plaintiff-Appellee,

v.

JOHN HANCOCK LIFE INSURANCE COMPANY
(U.S.A.),

Defendant-Appellant.

Appendix D

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 3959
James B. Zagel, *Judge*.

ORDER

Plaintiff-appellee filed a petition for rehearing and rehearing en banc on February 14, 2011. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Judge Flaum and Judge Williams did not participate in the consideration of this petition.